In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 430

DAVID SWIDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 60a–62a)[1] was withdrawn (R. 63a) and was not reported. The second opinion of the court sitting *en banc* (R. 64a–66a) has not yet been reported.

[1] In the Court of Appeals both petitioner and the Government filed printed appendices containing portions of the reporter's transcript of the trial proceedings. The record in this Court is composed of those two appendices. References to the appendix for petitioner will be designated, "R." References to the appendix for the Government will be designated, "A."

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1953. (R. 63a.) The petition for a writ of certiorari was filed October 23, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was denied. He rested without offering evidence and the jury returned a verdict of guilty. Petitioner then filed a motion for judgment of acquittal or, in the alternative, for a new trial. The question presented is:

Whether the court's order denying the motion for judgment of acquittal but granting a new trial is a final and appealable decision under the provisions of 28 U. S. C. 1291.

STATUTE AND RULES INVOLVED

28 U. S. C.:

> SEC. 1291. *Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct

review may be had in the Supreme Court. * * *

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 29. Motion for Acquittal.

(a) *Motion for Judgment of Acquittal.*

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.*

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may

on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 33. *New Trial.*

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On March 6, 1952, an indictment was filed against petitioner in the United States District Court for the Eastern District of Pennsylvania charging him with wilfull attempted evasion of his income taxes for the calendar year 1945, in violation of Section 145 (b) of the Internal Revenue Code. The single count of the indictment alleged that petitioner had filed a fraudulent return stating that his net income was $4,601.47 and that the tax due was $765.36, whereas he knew

that the figures should have been $110,516.01 and $78,199.73. (R. 2a–3a.)

The evidence adduced by the Government may briefly be summarized as follows:

During 1945, the taxable year, petitioner supplied cash to a luggage manufacturer for the purchase of large quantities of cloth from mills. When the cloth was delivered to the luggage factory petitioner took charge of it. (A. 1a–6a.) Representing himself as a salesman for either Charles Schwartz or J. Levenson, he then sold it to various dealers at a considerable profit.[2] (R. 36a–42a; A. 12a, 15a, 21a.) Invoices to the purchasers were always in the name of Schwartz or Levenson. (R. 10a; A. 4a–22a, 26a–27a.) The checks in payment were made out to Schwartz or Levenson, but they were either handed to petitioner personally or mailed to him. (A. 10a, 12a–22a; cf. R. 8a–10a and A. 24a–25a.) When one of the purchasers asked about the identity of Schwartz or Levenson, petitioner said, "As long as you are getting the piece goods that you want and so long as it is being billed to you with a legitimate bill, what difference does it make to you?" (A. 21a–22a.) Some of the people with whom he had contacts in the course of these dealings actually knew him, not as Swidler, but as

[2] In some instances the purchasers apparently realized that they were actually buying the goods from petitioner himself. (A. 7a–8a, 17a–18a.)

either Schwartz or Levenson. (A. 6a, 11a, 22a–23a.)

The Schwartz and Levenson checks which petitioner received were always cashed at check cashing firms in New York.[3] (R. 13a–36a.) The manager of one of these firms knew petitioner as Charles Schwartz. (R. 13a–14a, 21a.) He was always accompanied by one or two other men when he came in. (R. 25a–26a, 29a.) When checks made out to Schwartz were presented, the manager counted out the money and gave it to petitioner. (R. 13a–18a, 21a, 23a–24a, 28a.) Petitioner introduced one of the other men as Levenson, and Levenson and petitioner always came in together when they had a Levenson check to cash. The manager counted out the money and gave it "to them". (R. 18a, 21a–25a, 28a–29a.)

Treating all these checks as income to petitioner (R. 36a–48a), the Government computed his true net income for 1945 to be $79,414.48 (R. 48a). His return for that year showed a net income of only $5,101.47 derived from a partnership. (R. 4a–7a, 48a, 53a–56a.)

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was overruled. (R. 52a.) The defense then rested

[3] The one check which was made out in petitioner's own name was deposited in his personal bank account. (R. 8a–10a, A. 24a–25a.)

without offering any evidence and the jury returned a verdict of guilty. (R. 1a; Pet. 4.)

After the verdict petitioner filed a timely renewal of the motion for a judgment of acquittal, asking in the alternative for a new trial under the provision of Rule 29 (b). The stated grounds for both alternatives were: (1) that the evidence was insufficient; (2) that the original motion for judgment of acquittal should have been granted; (3) that the verdict was contrary to the weight of the evidence; and (4) that it was error to admit certain checks not shown to have been paid to petitioner. (R. 57a.) The trial judge refused a judgment of acquittal, but granted a new trial in "the interests of justice". (R. 58a.) Petitioner noted a timely appeal.[4] (R. 2a.)

The Government filed a motion to docket and to dismiss the appeal on the ground that the order of the District Court was not final. (R. 59a.) The appeal was dismissed by a three-judge panel of the Court of Appeals. (R. 60a.) Thereafter the case was reargued before the full bench and was again ordered dismissed. (R. 63a.) The original opinion of the court was withdrawn and a new one filed in which the full bench concurred. Assuming *arguendo* that the evidence was insufficient to support the verdict, the court pointed out that the provisions of Rule 29 would require the trial court to enter a judgment of

[4] The notice of appeal has not been included in the record.

acquittal under such circumstances. The court held, however, that since no sentence was imposed and a new trial was granted on petitioner's motion therefor, the order of the District Court was not "a final reviewable decision within the purview of Section 1291." (R. 64a–66a.)

ARGUMENT

Petitioner contends (Pet. 6–14) that the provisions of Rule 29 (*supra*, p. 3) required the trial court to grant a judgment of acquittal if the evidence was insufficient, and that the denial of his motion was a final and appealable decision. But, as the court below unanimously held *en banc*, the order of the District Court was neither a final judgment nor a final decision. Petitioner's contention is without merit.

1. Preliminarily, it should be pointed out that the premise of petitioner's argument (and the assumption *arguendo* of the Court of Appeals)—that the grant of the new trial was based upon an insufficiency of the evidence—is inconsistent with the most logical interpretation of the District Court's order. For the District Court merely stated that "the interests of justice require that a new trial be granted," without indicating the basis for that conclusion (R. 58a). Even from the brief summary of the evidence recited above (pp. 5–6), it is apparent that there certainly was "some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S.

150, 254; *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837. Inasmuch as petitioner had assigned as one reason for his alternative motions alleged errors in admitting evidence, it is at the very least a logical inference that it was on this ground, and not upon the insufficiency of evidence, that the new trial was granted. It would thus appear that the Court of Appeals actually decided only a hypothetical question not necessarily presented by the record.

2. Basic to petitioner's entire argument—which assumes with the court below that the evidence was insufficient (but cf. *supra*)—is his contention (Pet. 7, 10, 12, 13, 14) that there is an absolute and Constitutionally guaranteed right to acquittal where there is insufficient evidence of guilt, and that this absolute right is made explicit by the provisions of Rule 29. It may be conceded that such a right accrues before verdict, but it has always been the law that the filing of a motion for a new trial after verdict of guilty operates as a waiver of the right. Prior to the adoption of Rule 29, the district courts commonly granted new trials because of insufficiency of the evidence, but they either did not have or did not in fact commonly exercise the power to enter a judgment of acquittal after verdict. Thus, a defendant, whose motions for a directed verdict were denied at the end of the Government's case and again at the close of all the evidence, was commonly thought to

have no choice after verdict except to move for a new trial.[5] Allowance of the motion effected a waiver of the accrued right to an acquittal. The lack of finality under such circumstances is so obvious that we have been able to discover no case in which an appeal was even attempted.

One of the objects of Rule 29 was to sanction the practice, followed by a few district courts but left uncertain by this Court (*Ex parte United States,* 101 F. 2d 870 (C. A. 7), affirmed by an equally divided Court, *sub nom. United States* v. *Stone,* 308 U. S. 519), of permitting a motion for judgment of acquittal after verdict as an alternative to a motion for new trial.[6] But there is nothing to indicate that the allowance of the requested new trial should no longer operate as a waiver of the allegedly accrued right to acquittal. In ultimate analysis, peti-

[5] See Brief for the United States in *Bryan* v. *United States,* No. 178, October Term, 1949, pp. 18, 20–21, 37–39.

[6] The Advisory Committee on the Rules appended the following notes to Rule 29:

"*Note to Subdivision* (*a*). 1. The purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities. The change of nomenclature, however, does not modify the nature of the motion or enlarge the scope of matters that may be considered.

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"*Note to Subdivision* (*b*). This rule is in substance similar to Rule 50 (b) of the Federal Rules of Civil Procedure, following 28 U. S. C. § 723c, and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts have recognized and approved the use of a judgment non obstante veredicto for the defend-

tioner's argument seems to boil down to a contention that he cannot twice be placed in jeopardy for the same offense.[1] But it is settled that petitioner waived this right by requesting and obtaining a new trial. *Bryan* v. *United States*, 338 U. S. 552, 560.

In the *Bryan* case, there was a similar alternative motion for judgment of acquittal and for a new trial. The motion was denied and sentence was imposed. The Court of Appeals for the Fifth Circuit reversed for insufficiency of the evidence, but it ordered a new trial instead of directing a judgment of acquittal. Bryan petitioned for a writ of certiorari on the ground that Rule 29 entitled him to a judgment of acquittal. This Court granted certiorari and affirmed the judgment of the Court of Appeals. Although not squarely controlling here, since this Court held that Rule 29 does not apply to appellate courts, the case is persuasive in that, though the evidence was insufficient, a new trial was ordered instead of an acquittal, largely because Bryan's motion

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ant in a criminal case. *Ex parte United States*, 101 F. 2d 870, C. C. A. 7th, affirmed by an equally divided court, *United States* v. *Stone*, 60 S. Ct. 177, 308 U. S. 519, 84 L. Ed. 441. The rule sanctions this practice."

When such an alternative motion is made after verdict in a civil case, it is clear that the district court may in its discretion choose either alternative. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 215.

[1] The due process argument, *i. e.*, that petitioner cannot be convicted except upon sufficient evidence, is of no avail since the conviction has been set aside.

in the District Court had requested one or the other of these remedies in the alternative.[8] 338 U. S. at 558–560.

3. The order denying a judgment of acquittal and granting a new trial was not a final judgment. It did not result in institution of disciplinary measures and was not a determination of guilt. *Korematsu* v. *United States,* 319 U. S. 432, 435; *Berman* v. *United States,* 302 U. S. 211, 212–213. But petitioner insists that the order was a final "decision" within the meaning of 28 U. S. C. 1291 (*supra,* p. 2), relying on such cases as *Stack* v. *Boyle,* 342 U. S. 1, 6, 12, and *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545, 547. See also *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 688–689. Perhaps the best analysis of this line of cases is that of the Court of Appeals for the District of Columbia Circuit:[9]

> We understand the Cohen and Swift cases to establish this principle. An order that does not "terminate an action" but is, on the contrary, made in the course of an action, has the finality that Section 1291 requires for appeal if (1) it has "a final and irreparable effect on the rights of the

[8] The opinion of the Court touches only obliquely on the duty of a trial court when faced with such an alternative motion after verdict. 338 U. S. at 559. But the opinion of the concurring Justices clearly indicates that, in their view, the district court may order a new trial under Rule 29 when the evidence is insufficient to support the verdict.

[9] *United States* v. *Cefaratti,* 202 F. 2d 13, 16, certiorari denied, 345 U. S. 907.

> parties," being "a final disposition of a claimed right"; (2) it is "too important to be denied review"; and (3) the claimed right "is not an ingredient of the cause of action and does not require consideration with it." * * *

Measured by this test, the order of the District Court is clearly not a final and appealable decision.

(a) The order of the District Court has no final effect on the rights of the parties and is not a final disposition of petitioner's right to a judgment of acquittal on the pending charge. That remedy remains open to him after the presentation of the evidence at the new trial. Had petitioner been content to file only a motion for judgment of acquittal, the denial of that motion would have been followed by imposition of sentence and a final judgment. But petitioner requested *either* a judgment of acquittal *or* a new trial on the ground that the evidence was insufficient, and he cannot now complain that his right to a judgment of acquittal has been finally determined when, at his own request, the entire trial proceedings have been set aside. See *supra*, pp. 9–12. Nothing has been determined contrary to petitioner except that he is not entitled to an acquittal at the present time.

(b) The order is not "too important to be denied review." True, it will, as petitioner contends (Pet. 13), subject him to the inconvenience of an-

other trial. But this is the necessary result of the Congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30–31; *Cobbledick* v. *United States*, 309 U. S. 323. If petitioner's argument were carried to its logical conclusion, and, indeed, the petition appears to make this very contention (Pet. 10), the denial of a motion for a judgment of acquittal at the close of the Government's case would be a final decision, and the trial would be interrupted by an appeal as of right at that point.[10]

(c) Petitioner's claimed right to a judgment of acquittal is not separable from the main action. On the contrary, it goes to the very heart of the cause of action. The case is, therefore, clearly distinguishable from the *Cohen, Swift* and *Stack* cases, *supra,* which involved separable and auxiliary proceedings such as attachments and applications for bail. The decisions appealed from there had a final effect upon the rights of the parties which could not be remedied by an appeal in the main action.[11] Here, however, petitioner will still be able to obtain a judgment of acquittal if the Gov-

[10] Petitioner's reference to *Brock* v. *North Carolina*, 344 U. S. 424, is not in point. Brock was objecting to a second trial after the prosecutor had requested and obtained a mistrial in the original proceedings. Furthermore, this Court held that under the circumstances the interests of justice were served by ordering a new trial.

[11] Cases involving appeals from orders denying or granting motions to suppress evidence *prior to indictment* are likewise inapposite. There also the order appealed from is sep-

ernment fails to present substantial proof of the essentials of the charge at the next trial.

4. Petitioner also contends (Pet. 13–14) that the grant of a new trial was improper, and that the denial of the judgment of acquittal must, therefore, be final. The argument is that the District Court acted on its own initiative and not on petitioner's motion, since it granted the new trial "in the interests of justice" instead of for any one of the reasons specified in the motion; and that it was without power to act on its own initiative since more than five days had elapsed after the return of the verdict. The argument is plainly without merit. The trial court was clearly acting on petitioner's motion. "The first sentence of this rule[12] is declaratory of the power to grant a new trial 'in the interest of justice' instead of for reasons catalogued as they might have been. The generality of the reasons assigned by [the trial judge] for the order in question is all that is required." *United States* v. *Smith*, 331 U. S. 469, 472.

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arable from the main action. See *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Go-Bart Co.* v. *United States*, 282 U. S. 344; and cf. *Cogen* v. *United States*, 278 U. S. 221.

[12] Rule 33, *supra*, p. 4. An immaterial footnote has been omitted from this quotation.

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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